SUPREME COURT, U. S.

No. 1073

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In the Supreme Court

of the

United States

October Term 1966

LAURENCE COLBRESE, JR.,

Petitioner,

vs.

NATIONAL FARMERS UNION PROPERTY & CASUALTY COMPANY,

Respondent.

Respondent's Brief Opposing Petition for Writ of Certiorari

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Respondent National Farmers Union Property & Casualty Company respectfully submits this brief opposing the Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals:

STATEMENT

The decision in *Laurence Colbrese, Jr., vs. National Farmers Union Property & Casualty Company* in the Ninth Circuit Court of Appeals, out of which the petition in this cause arises, is reported at 368 F.2d 405 (1966). It will be hereafter referred to as "Colbrese."

The decision of the Montana State Supreme Court, with which petitioner claims Colbrese is in conflict, is *Safeco Insurance Company v. Northwestern Mutual Insurance Company* (Mont. 1963) *382 P.2d 174*. We shall refer to it as "Safeco."

The essential facts in Colbrese were undisputed between the parties. They were established by admissions in the pleadings, by responses to demands for admissions, and by stipulation. Respondent deems the statement of facts in the petition here inadequate to give the Supreme Court a clear picture in Safeco and in Colbrese. Accordingly we set forth those facts here.

(a) Facts in Colbrese Case.

The Colbrese action involves the interpretation of the phrase "non-owned automobile" contained in insurance policies issued by the respondent to one Albert Kinney. The claim for coverage under the policies arises out of a fatal accident involving a 1949 Ford automobile operated by one Jerry Kinney, the son of Albert Kinney.

The petitioner, Laurence Colbrese, Jr., is the father of the decedent involved in the fatal accident and is in

this case as the assignee of Albert Kinney, the purported insured.

In and prior to 1957, the record owner of the 1949 Ford automobile was one C. W. Ehart. By "record owner" we mean that the Registrar of Motor Vehicles of the State of Montana had issued to C. W. Ehart a Certificate of Ownership pertaining to said vehicle. C. W. Ehart died, leaving as his sole heir, one Robert McCormick. Upon Ehart's death Robert McCormick became entitled, as the sole heir, to all of Ehart's right, title and interest in the Ford. Then Robert McCormick also died, leaving as his sole heir Mrs. Robert McCormick, his widow, who thereupon became entitled to all of Robert McCormick's right, title and interest in the said Ford.

In 1957, after the death of Ehart and Robert McCormick, Mrs. Robert McCormick sold or agreed to sell, the 1949 Ford automobile to Albert Kinney.

Albert Kinney paid the full consideration to Mrs. Robert McCormick for the Ford. He took possession of the vehicle and used it as his own for nearly three years. The record is clear that the only person who could claim adverse title to the Ford, Mrs. Robert McCormick, claims no title to it, and since the time of the transaction has regarded Albert Kinney as the owner of the Ford.

At the time of the transaction Albert Kinney received from Mrs. Robert McCormick the "Certificate

of Registration and Tax Receipt" upon which license plates are issued in Montana. Albert Kinney actually paid for the Montana license plates for the Ford automobile for the years 1959 and 1960.

The C. W. Ehart estate is the subject of a probate proceedings in the appropriate state district court in Yellowstone County, Montana. Mrs. McCormick, as well as being the sole heir of that interest, was also the administratrix of the Ehart estate at or about the time of the transaction with Kinney.

Since 1957 Kinney has claimed to be the owner of the Ford, has been in possession of it, and thought himself to be the sole owner of all right, title and interest to it.

However, the "Certificate of Ownership" issued by the Registrar of Motor Vehicles of the State of Montana, has not been delivered to Albert Kinney by Mrs. McCormick or anyone else.

Albert Kinney requested of Thomas Bradley, Esq., the attorney representing Mrs. Robert McCormick in the transaction, and also the attorney handling the C. W. Ehart estate, on several occasions, that the title certificate of ownership of the Ford be issued to him. He made these requests before the fatal accident occurred.

After Albert Kinney acquired the Ford, he procured from this respondent a policy of insurance on the Ford, providing for bodily injury liability and property damage coverages. Albert Kinney paid the re-

spondent company the insurance premiums due upon this policy for the years 1958 and 1959, but he allowed the policy to lapse for non-payment of premium on September 2, 1960. Thus, this policy of insurance was lapsed and not in effect on the date of the death of the minor, Duane Colbrese, December 3, 1960.

On that date, December 3, 1960, when Jerry Kinney, the son of Albert Kinney, was driving the Ford, it ran off the highway on an icy stretch, upset, and thereby brought about the fatal injuries to the person of Duane Colbrese.

At the time of the fatal accident, however, Albert Kinney had two other motor vehicles, a 1951 Dodge passenger automobile and a 1954 International 1½ ton truck Each of these vehicles were insured by the respondent insurance company in separate policies.

Each of these policies included provisions, set out in full in the Ninth Circuit decision in *368 F.2d* at page *406*. In effect, if the 1949 Ford automobile were "a non-owned automobile" it would be eligible for insurance under the policies issued by the respondent on the Dodge automobile or the International truck.

(b) Facts in Safeco Case.

A quite different state of facts is involved in the *Safeco* decision.

In *Safeco,* Bear Paw Sales & Service, Inc., a new and used car dealer, had on hand a 1958 Studebaker car. At the same time one Harlan Dean was the owner of a 1958 Hillman automobile.

On May 9, 1960, Harlan Dean drove his Hillman to Bear Paw's premises and arranged to try out the Studebaker and show it to his wife. A price of $350.00 plus trade-in was discussed. Dean left the Hillman with Bear Paw and drove away with the Studebaker which he used in his work that day. On the following day Dean told the Bear Paw people that he would take the Studebaker. He continued in possession of the car on that day and on the following day, May 11, 1960, Dean was involved in a serious collision with the Studebaker.

At the time of the collision Northwestern Mutual Insurance Company had issued a garage owner's liability insurance policy to Bear Paw; Safeco Insurance Company had issued its policy of insurance covering the Hillman. Each company declined coverage for the collision of May 11, 1960, and the suit for declaratory judgment resulted.

The foregoing facts may be found in *382 Pac.2d* at page *175*.

Other facts important to the *Safeco* decision are these: the certificate of title to the Studebaker was never assigned by Bear Paw to Harlan Dean nor was it ever delivered to him, nor was any application for registration of the Studebaker ever executed by Dean. No papers were transferred by either party to the Registrar of Motor Vehicles to transfer the title.

Moreover, Bear Paw kept a record of all cars in stock and still had its record of the Studebaker. No

book entries were made with respect to any sale of the Studebaker automobile by Bear Paw to Dean, nothing was signed, no order was signed or paper of any kind. Dean still had the title to the Hillman automobile in his possession. Bear Paw had the title to the Studebaker automobile in its possession. No records on the Hillman appeared on the Bear Paw books.

Most important, following the accident Dean took the Hillman car back from Bear Paw, and "the matter was at an end."

The foregoing additional facts may be found in *382 P.2d*, at pages *176, 177*.

ARGUMENT

1. The Colbrese decision does not conflict with Safeco.

From the foregoing statement of facts it is clear that a much different situation faced the Ninth Circuit Court of Appeals in *Colbrese* than faced the Montana Supreme Court in *Safeco*.

In deciding *Colbrese* the Ninth Circuit Court of Appeals did not overlook the decision in *Safeco*. Rather the Circuit Court was very much aware of *Safeco* and carefully distinguished its decision in *Colbrese* from *Safeco* on the law and on the facts *(368 F.2d, pp. 409, 410)*. In a footnote, the Circuit Court noted that the District Court recognized factual distinctions in many respects *(368 F.2d, p. 410, footnote 2)*.

The Circuit Court said that it did not interpret *Safeco*, as "laying down a hard and fast rule to the effect that an automobile may not under any circumstances be an automobile owned by the insured within the meaning of an insurance policy unless the insured is the holder of the certificate of ownership." *(368 F.2d, p. 409, 410)*

There is in fact an earlier decision in the United States District Court in Montana, which buttresses the foregoing statement of the Circuit Court of Appeals. In *Firemen's Insurance Company of Newark, New Jersey v. Show,* (U.S.D.C., Mont.) *110 F. Supp. 523*, the late Judge Pray was called upon to interpret the same statutory subdivision relied on by the petitioner in this case. In the *Firemen's* case it appeared that one Jerry Show had bought a truck and took delivery of it on December 5 or 6 of 1950. Application was made to the Registrar of Motor Vehicles for a Certificate of Ownership in his name. Eventually such a certificate was received from the Registrar on December 20, 1950. But in the meantime, on December 17, 1950, before the Certificate of Ownership had been issued, the truck was involved in an accident. Jerry Show had obtained insurance on the truck on November 29, 1950, just before the purchase. The insurance company contended that because the certificate of title had not been issued on the date of the accident, Show was not the owner of the truck and the dealer was still its owner because of the provisions of *Sec. 53-109(d)*. Judge Pray summarily dis-

posed of this contention *(110 F. Supp., p. 523)* and pointed out that the insurance contract had been executed and was in effect during the time that the application had been made for the certificate of title; and that to hold for the insurance company would result in an option to the insurer to claim an alleged voidness or invalidity which would raise a cloud on every policy of automobile liability insurance. He rejected the contention of the insurance company as without merit.

The decision of Judge Pray in the *Firemen's* case occurred before the decision in *Safeco*. Yet *Safeco* did not overrule or modify the *Firemen's* decision, specifically or by implication.

The decision in *Firemen's* is not cited by petitioner in his brief to this court. Yet it constitutes an exception to the hard and fast rule claimed by the petitioner as to the effect of *Sec. 53-109(d)* relating to insurance policies.

It appears therefore that the Ninth Circuit Court of Appeals was correct in assuming that *Safeco* had not decided the very question involved in *Colbrese (308 F.2d at page 409)*. Therefore, no conflict exists between the two cases.

Petitioner has taken general statements from the *Safeco* decision, and attempted to give those general statements universal and absolute application. It is, however, settled law, universally applied, that general statements found in an opinion are to be read in the light of the facts of the case which the court was then con-

sidering. See *Lindblom v. Employers Liability Assurance Corporation, 88 Mont. 488, 499; 295 Pac. 1007, 1010; Farbo v. School District #1, 95 Mont. 531, 538, 539; 28 P.2d 455, 457.*

2. The Colbrese decision does not involve any question of general public importance.

It is inconceivable that the facts which occurred in the *Colbrese* case, as we have outlined them above, could occur again.

The *Colbrese* decision does not affect in the slightest degree the administration of the Montana statutes with respect to the registration of motor vehicles or the ministerial duties involved therein.

3. The petitioner seeks to go outside the Colbrese record to fault the Ninth Circuit Court of Appeals.

The material contained in Appendix B, pp. 38-54, inclusive, in the petition in this case is not a part of any record in the *Colbrese* case. It is certainly not a part of the record before the Ninth Circuit Court of Appeals at any time before it made its decision.

We submit that the Circuit Court of Appeals, in determining Montana law, is entitled to rely upon the reported opinions of the Montana Supreme Court, and upon the law and the facts as they are contained in those opinions. It is not required to go outside of the reported opinions, or the record in the cause which it is considering, to make its decison.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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